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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

No. [redacted] 102

ECONOMY FORMS CORPORATION,
Petitioner,

vs.

TRINITY UNIVERSAL INSURANCE COMPANY and EMPLOYERS REINSURANCE CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

HARLAN J. THOMA,
Counsel for Petitioner,
BRODY, PARKER, ROBERTS, THOMA, & HARRIS,
400 Empire Building,
Des Moines, Iowa 50309.

Of Counsel:
VAL L. SCHOENTHAL,
BRODY, PARKER, ROBERTS, THOMA & HARRIS,
400 Empire Building,
Des Moines, Iowa 50309.

HERBERT L. MESCHKE,
PRINGLE, HERIGSTAD, MESCHKE, LODER,
MAHONEY & PRINGLE,
214 American State Bank Building,
Minot, North Dakota.

R. L. Mesenhall, Inc., 1106 Oak Street, Kansas City, Mo. 64106, HArrison 1-3030

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IN THE

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No. ....

ECONOMY FORMS CORPORATION,
Petitioner,

vs.

TRINITY UNIVERSAL INSURANCE COMPANY and EMPLOYERS REINSURANCE CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Economy Forms Corporation, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled case on February 1, 1965.

OPINIONS BELOW

The opinion of the District Court for the District of North Dakota (R. 11) is reported at 234 F. Supp. 930. The opinion of the Court of Appeals for the Eighth Circuit (*infra*, Appendix, page A1) is reported at 340 F.2d 613 (1965).

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on February 1, 1965 (*infra*, Appendix, page A2). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

The question presented for review is whether the petitioner's suit on a bond required and furnished pursuant to the provisions of the Capehart Act, 42 U.S.C. § 1594(a), is controlled by the limitation period specified by the bond or by the shorter period set forth in the Miller Act, 40 U.S.C. § 270b(b).

STATUTES INVOLVED

The pertinent parts of the Miller Act, 40 U.S.C. § 270a-e, and of the Capehart Act, 42 U.S.C. § 1594, respectively, are set forth in the Appendix beginning at page A2 following the copies of the opinion and judgment below.

STATEMENT

The petitioner, Economy Forms Corporation, instituted the present action in the District Court for the District of North Dakota in February, 1963, asserting jurisdiction under the so-called Capehart Act, 42 U.S.C. § 1594(a) and under the general bond statute, 28 U.S.C. § 1352 (R. 1). It is a suit to recover for labor and material furnished to Grand Construction, Inc., a subcontractor on a Capehart project at Minot Air Force Base at Minot, North Dakota.

The respondents (defendants below) are sureties on the official payment bonds furnished by the prime contractor, United-Mack, a joint venture.

The basic facts, which are not in dispute, are: that the petitioner did not commence this action prior to "the expiration of one year after the day on which the last of the labor was performed or material was supplied" by it, as required by 40 U.S.C. § 270b(b) for suits under the Miller Act; that the payment bonds (Exs. 2 and 3, R. 20 and 25, as supplemented by Appellant's Supplemental Record, page 4) furnished by the defendants were, as required by Article XIII, section 21 of the prime contract (Ex. 1, R. 18), on FHA Form No. 2452 CP and in a penal amount totalling one hundred per cent of the contract price of $3,441,889.00 set forth in Article III of the prime contract (Ex. 1, R. 14, 17); that among the conditions prescribed in the said bonds was (R. 22-23 and R. 27):

> "4. No suit or action shall be commenced hereunder by any claimant, * * *
>
> "(b) After the expiration of one (1) year following the date on which Principal ceases work on the contract."

The question presented here (whether the period prescribed in the bond is reduced to the shorter period prescribed in the Miller Act) was raised by the defendants in the District Court by a motion for summary judgment which was granted (R. 13) and affirmed by the Court of Appeals (*infra*, Appendix, page A1).

REASONS FOR GRANTING THE WRIT

The writ petitioned for herein should be allowed for the following special and important reasons, each of which is briefly amplified below:

1. The decision below of the Court of Appeals for the Eighth Circuit directly and irreconcilably conflicts with the decisions of two other courts of appeal on the same matter.

2. The decision below decided an important question of federal law which has not been, but should be, settled by this Court.

3. The decision below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

1. The Decision Below of the Court of Appeals for the Eighth Circuit Is in Conflict with the Decisions of the Courts of Appeal for the Tenth and Third Circuits.

The decision below is in clear conflict with the decision of the Court of Appeals for the Tenth Circuit, which held in *United States for Use and Benefit of Miles Lumber Company* v. *Harrison and Grimshaw Construction Company et al.*, (10th Cir. 1962) 305 F.2d 363, *cert. denied* 371 U.S. 920, that, since a Capehart project is not "a public building or public work of the United States" (40 U.S.C. § 270a(a)), the Miller Act was not applicable, concluding, *Id.* at 368-369:

> "We are aware of the rule that the Miller Act is to be liberally construed to accomplish its purpose of protecting those who furnish labor and material in the performance of contracts for the construction of public works, but that rule has no application here. We are concerned with a Capehart Act project bond and we are convinced that the Miller Act has no application to such a bond. * * *"

Judge Pickett dissented on this point.

Thus, a claimant in the Tenth Circuit would not be barred, as was the petitioner in this case in the Eighth

Circuit, by any application of the Miller Act, including its shorter limitations requirement applied here.

The conflict with the Tenth Circuit's view and holding has been recognized by the Eighth Circuit at page 451 of 336 F.2d in *Continental Cas. Co.* v. *Allsop Lumber Co.*, (8th Cir. 1964) 336 F.2d 445, *cert. denied* 85 S. Ct. 862 (1965). (Petition for writ of certiorari was by the surety and restricted to the narrow question of whether jurisdiction of suits on Capehart bonds had been properly asserted on the basis of 28 U.S.C. § 1352. It did not challenge any of the several other issues decided and discussed *infra*. See "Questions Presented," Petition for Writ of Certiorari, U.S. Docket No. 630, filed October 27, 1964.)

The conflict was noted again in *Koppers Co.* v. *Continental Cas. Co.*, (8th Cir. 1964) 337 F.2d 499, the court stating, at page 503:

> "We respect the opinion of the Tenth Circuit majority but, in view of the vigorous dissent there and our own holding in Allsop, we must adhere to the conclusion reached in Allsop until the Supreme Court tells us that we are mistaken."

The decision below is also in conflict with that of the Court of Appeals for the Third Circuit which in *National State Bank of Newark* v. *Terminal Construction Corporation*, (3d Cir. 1964) 328 F.2d 315, affirmed *per curiam*, "The judgment of the District Court . . . for the reasons stated by Judge Lane in his excellent opinion reported at 217 F. Supp. 341 (D. N.J. 1963)."

In that case, the first matter considered was that of the court's jurisdiction, it being noted that, ". . . throughout their briefs and arguments the parties have raised the issue of the applicability of the Miller Act and the cases decided thereunder," 217 F. Supp. at 348. After a review of the early cases holding, "that a suit on a Capehart bond must

be brought under the Miller Act, and that the latter Act grants the court jurisdiction to hear the case," the court noted that, "The rationale of these cases is that the Capehart Act [quoted and cited as 42 U.S.C. § 1594(a)] incorporates the Miller Act by reference." *Ibid.*

Observing then that, "However, the latest decisions in this area hold that such is not the case," the court reviewed them (including a substantial quotation from the Eighth Circuit's decision in the *Robertson Lumber* case (*Continental Cas. Co.* v. *United States ex rel. Robertson Lumber Co.*, (8th Cir. 1962) 305 F.2d 794, *cert. denied* 371 U.S. 922, discussed extensively below herein) and concluded, 217 F. Supp. at 349:

> "Another court, the Tenth Circuit, has analyzed the language of the Capehart and Miller Acts and also concluded that a bond given under the Capehart Act does not fall within the scope of the Miller Act [citing *Miles Lumber, supra,* 305 F.2d 363, *cert. denied* 371 U.S. 920].
>
> "We consider this the better construction of the statute, and accordingly rule that the procedural provisions of the Miller Act do not apply to the bonds in suit."

Rejecting the contentions that the suit should have been brought in the name of the United States (as is required in Miller Act cases), the court next turned to the question as to, "[H]ow controlling as to substantive law are cases decided under the Miller Act." 217 F. Supp. at 350. After again examining the earlier cases and again quoting at length from the opinion of the Eighth Circuit in the *Robertson* case, *supra,* Judge Lane concluded, *id.* at 351:

> "We find the protection accorded by the Miller and Capehart Acts is in many instances identical. Both are an attempt to protect the laborers and material men on

a government project, where they may have no rights under the state lien laws. To this extent the two acts should be interpreted together, and this court will do so *except in those cases where the Miller Act, or the cases decided under it, are contradicted by* the Capehart Act, the cases decided under it, or *the terms of the bond.*" (Emphasis added; footnotes omitted.)

Thus the suit herein would not have been barred in the Third Circuit where the shorter limitations period of the Miller Act would not be regarded as controlling since it is clearly "contradicted by . . . the terms of the bond."

2. The Decision Below Decided an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court.

The narrow question of federal law decided below, namely, whether suits on Capehart bonds are controlled by the limitations provision of the bonds or that of the Miller Act, is important because of its obvious consequence to the timing and status of claims on such bonds. However, its actual significance is vastly broader and greater since it inescapably and necessarily requires a resolution of the *underlying question* as to the full, limited or nonapplicability of the Miller Act to Capehart projects, bonds and suits. That *fundamental question* necessarily affects an entire gamut of questions raised by the many significant variances between the provisions of such bonds and the Miller Act, as to which there has emerged an extensive, widespread, irreconcilable and indeed chaotic conflict of opinions and decisions among, not only many of the federal courts of appeal and district courts, but between the Eighth Circuit and many of the state courts.

Among these subsidiary questions, the answer to which depends directly on the resolution of the basic question presented here as to the applicability of the Miller Act, are:

(a) *Whether* "first tier" claimants having direct contracts with the prime contractors (who are the principals on the bonds) are required as a condition precedent to suit to give the notices required by the bonds which, in condition 4(a) (Ex. 2, R. 20, 22), require such notice by "any claimant" and, in condition 1 (Ex. 2, R. 20, 21) define "claimant" as including, "one having a direct contract with the Principal," *or whether* they are not so required because the Miller Act, 40 U.S.C. § 270b(a), requires such notices only by those of the "second tier" who have no such direct contracts.

In *United States ex rel.* v. *Hal B. Hayes & Associates, Inc.*, 221 F. Supp. 260 (N.D. Cal. 1963), the notice required of "first tier" claimants by the bond but not by the Miller Act was not given. The district court noted that, "The question is thus whether these requirements can be enforced in derogation of the provisions of the Miller Act," and observed that, "The holdings or language of the appellate courts in three different circuits appear to have established three different tests to be applied to the instant question." *Id.* at 262.

After reviewing the decisions of the Courts of Appeals for the Tenth Circuit (in *Miles Lumber, supra,* 305 F.2d 363), the Eighth (in *Robertson Lumber, supra,* 305 F.2d 794) and the Fifth (in *Lasley* v. *United States ex rel. Westerman* (5th Cir. 1960, 285 F.2d 98), the district court said, at 221 F. Supp. 263:

> "Thus, the Fifth Circuit Court of Appeals has at least inferentially set forth the proposition that the notice requirements of the Miller Act do apply to a Capehart Act bond.
>
> "Neither the Supreme Court of the United States nor the Court of Appeals for the Ninth Circuit have yet had occasion to rule directly on the notice question

which concerns us here. Under the circumstances, this Court is obliged to choose from among the varying opinions in support of the opposing rules just cited. * * *"

(The Court opted for the reasoning of the Eighth Circuit as it was *then* set forth in the *Robertson Lumber* case, *supra,* and held that the notice specified by the bond was required. *Note, however,* that the rationale of the *Robertson Lumber* case to which the court referred has since been very substantially limited in subsequent decisions by different panels of the Eighth Circuit. Those decisions, reviewed below, have culminated in the instant case.)

(b) *Whether* the required notices must be given to others than the principal, as required by condition 4(a) of the bond (Ex. 2, R. 20, 22), *or whether* to him only, as required by the Miller Act, 40 U.S.C. § 270b(a).

On this point, the Eighth and the Tenth Circuits agree that the dual notices required by the bond are necessary, but for completely different reasons: the Tenth Circuit holding in *Miles Lumber, supra,* 305 F.2d 363, *cert. denied* 371 U.S. 920, decided June 15, 1962, that the Miller Act is inapplicable because Capehart projects are not "public works" and the Eighth Circuit stating fifteen days later in *Robertson Lumber, supra,* 305 F.2d 794, *cert. denied* 371 U.S. 922, that Capehart bonds have been taken "entirely out of the Miller Act" by the Capehart Act itself. *Id.* at 800.

Although certiorari was denied in both cases, it is noteworthy that, while conflicting widely in stated rationales, they reached the same conclusion. But contrast the result in both of them with that which would be required under the alternative holding in *Lasley, supra,* (5th Cir. 1961) 285 F.2d 98, 100 (on the question of federal court jurisdiction over Capehart bond suits), that:

"* * * the purpose of the bonding provisions in the Capehart Act was merely to substitute it for the bond described in 40 U.S.C.A. § 270b(b), quoted above, and that the remainder of the provisions of the Miller Act would apply to the Capehart bond just as they do to a Miller Act bond."

(c) *Whether* the required notice(s) may be given within the longer period allowed by condition 4(a) of the bond (Ex. 2, R. 20, 22), which incorporates the alternative periods provided in condition 2 (Ex. 2, R. 20, 22) of ninety days after the last furnishing of labor and materials or the period for giving first notice of mechanic's liens in the state where the project is located ("whichever period be longer"), as held in *Continental Cas. Co.* v. *Allsop Lumber Co.*, (8 Cir. 1964) 336 F.2d 445, *cert. denied* 85 S. Ct. 662 (1965). (*Note*: the petition for certiorari did not challenge this point; see "Questions Presented," Petition for Writ of Certiorari, U.S. Docket No. 630, filed Oct. 27, 1964.)

(d) *Whether* suit may be brought in the name of either of the obligees (neither of which is the United States) or in the name of the claimant, as provided in condition 2 of the bond (Ex. 2, R. 20, 22) and as has been consistently held by those courts which regard the Miller Act as not applicable *or whether*, as required by the Miller Act, "Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing. . . ." 40 U.S.C. 270b(b).

(e) *Whether* there is, as provided in the bond, concurrent jurisdiction in the state courts *or whether*, as provided in the Miller Act, such suits must be brought, "in the United States District Court . . . and not elsewhere." 270b (b).

On this question, *Koppers Co.* v. *Continental Cas. Co.*, (8th Cir. 1964) 337 F.2d 499, is in direct conflict with that

of the appellate courts of several states, including *Ireland's Lumber Yard* v. *Progressive Contractors, Inc.*, 122 N.W.2d 554 (N.D. 1963), *Allsop Lumber Co.* v. *Continental Cas. Co.*, 73 N.W. 64, 385 P.2d 625 (1963), *Minneapolis-Honeywell Regulator Co.* v. *Terminal Constr. Corp.*, 41 N.J. 500, 197 A.2d 557 (1964) and *Richter Contracting Co.* v. *Continental Cas. Co.* (Cal. D.C.A. 1964) 41 Cal. Rptr. 98. Ironically the first three of these state court decisions are founded primarily on their interpretation of the apparent holding of the Eighth Circuit in *Robertson Lumber, supra*, 305 F.2d 794, *cert. denied* 371 U.S. 922 (1962), that the Capehart Act took Capehart Act bonds "entirely out of the Miller Act." *Id.* at 800. In fact the New Jersey Supreme Court in the *Minneapolis-Honeywell* case, *supra*, relied primarily on that view as stated in *Robertson Lumber* in overruling its prior decision to the contrary in *Gypsum Contractors, Inc.* v. *American Sur. Co.*, 37 N.J. 315, 181 A.2d 174 (1962), decided before the *Robertson Lumber* decision.

(f) A concomitant question which is not directly related to any provision of the bond or Miller Act is *whether* valid extraterritorial service of process may be had on individual defendants. On this question the decision in *Continental Cas. Co.* v. *Allsop Lumber Co.*, (8 Cir. 1964) 336 F.2d 445, 450, *cert. denied* 85 S. Ct. 662 (1965), is recognized therein, *id.* at 451, as also being in conflict with the decision of the Tenth Circuit in the *Miles Lumber* case, *supra*, 305 F.2d 363, *cert. denied* 371 U.S. 920. (*Note*: the petition for *certiorari* did not challenge this point; see "Questions Presented", Petition for Writ of Certiorari, U.S. No. 630, filed Oct. 27, 1964.)

The decision of the Eighth Circuit in *Robertson Lumber, supra*, 305 F.2d 794, *cert. denied* 371 U.S. 922, like those of the Tenth Circuit in *Miles Lumber, supra*, 305 F.2d 363 and the Third Circuit in *National State Bank of Newark,*

supra, 328 F.2d 315, is also in conflict with the primary holding of the Fifth Circuit in *Lasley, supra*, 285 F.2d 98, that a Capehart supplier may sue in federal court by virtue of the grant of federal jurisdiction conferred by 40 U.S.C. 270b(b). That holding was specifically considered and rejected by the Eighth Circuit in *Robertson Lumber* at pages 798-799 of 305 F.2d. However, as further noted by it in footnote 4 at page 798, the additional grounds for federal jurisdiction under 28 U.S.C. §1352 noted by the Fifth Circuit avoids a complete conflict on the ultimate question of whether federal jurisdiction exists on one ground or the other. The most recent "Capehart decision" by the Fifth Circuit in *Autrey* v. *Williams & Dunlap*, (No. 20306, Febr. 24, 1965) ____ F.2d ____, 10 CCF, par. 72,926, adheres to both holdings which it believes are now shared by the Eighth Circuit, but not the Tenth.

In addition to the foregoing, several important administrative questions are directly dependent upon the resolution of the "heart issue" as to the applicability of the Miller Act; *e.g., whether* the bond shall name the United States as sole obligee (as required by 40 U.S.C. 270a(a) instead of the multiple obligees, not including the United States, now designated in it (Ex. 2, R. 20-21); *whether* the amount of the bond shall be the full amount of the contract price, as required by Article XIII of the prime contract (Ex. 1, R. 14, 18) or the very considerably lesser amounts provided in 40 U.S.C. 270a(a)(2); *and whether* the Comptroller General is required by 40 U.S.C. 270c to furnish claimants and defendants with certified copies of such bonds and contracts.

Presently, in those circuits in which the Miller Act has been held to be nonapplicable, *Miles Lumber, supra*, (10th Cir., 1962) 305 F.2d 363, *cert. denied* 371 U.S. 920, and *National Bank of Newark, supra*, (3d Cir. 1964) 328 F.2d

315, the above answers are clear. In the remaining circuits, the answers are very much in doubt. It is submitted that the governmental agencies charged with the responsibility for carrying out this important law and the substantial projects under it should be conclusively advised as to whether the Miller Act is applicable or not and, if so, to what extent; just as should the many persons who must plan and carry out their affairs under the applicable law(s) and the federal and state courts which are now confronted by perplexing choices among the widely divergent and often conflicting rationales and holdings of the courts which have dealt with the many related questions, most of which are—as is that in the instant case—directly dependent upon the resolution of that basic issue for correct determinations.

3. The Decision Below Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings As to Call for an Exercise of This Court's Power of Supervision.

In addition to the conflicts noted heretofore with other circuits and state courts, the decision below and the other recent decisions by the Eighth Circuit on which it relied are in obvious and basic conflict with each other and with other decisions of the same court which have not been overruled. This departure from the normal and accepted doctrine of *stare decisis* has created a regrettable confusion among litigants, lawyers and the district courts in the circuit. A lamentable lack of predictability exists since the circuit court's decisions concerning Capehart bond questions seem to depend upon the happenstance as to whether the majority of the panel hearing a particular Capehart Act bond case subscribe to or reject the underlying rationale and opinion stated by the majority in *Robertson Lumber, supra*, 305 F.2d 794, *cert. denied* 371 U.S. 922 (1962).

As noted above the narrow issue in *Robertson Lumber* (and before the Tenth Circuit in *Miles Lumber, supra,* 305 F.2d 363, *cert. denied* 371 U.S. 920) was whether the dual notices required by the Capehart Act bond or the single notice required by 40 U.S.C. 270b(a) were required. The Eighth Circuit held the dual notices to be required for the reason with which it concluded its opinion; namely, that:

> "* * * it is to be remembered that the only section of the Miller Act referred to in the Capehart Act is the section which requires the giving of a bond; and when Congress said in the Capehart Act that the giving of a bond satisfactory to the Secretary of Defense or his designee should constitute compliance with the section of the Miller Act which requires that a bond be given, we think that the clear import of the language used was to *take Capehart bonds entirely out of the Miller Act.*" 305 F.2d at 799-800. (Emphasis added.)

The opinion was written by Henly, D.J., joined by Judge Van Oosterhout. Judge Blackmun concurred.

The next "Capehart case" did not reach the Eighth Circuit until *D & L Constr. Co.* v. *Triangle Elec. Supply Co.,* (8th Cir. June 22, 1964) 332 F.2d 1009, and was not directly concerned with the applicability or nonapplicability of the Miller Act, which issue the court noted as being "immaterial." However, in noting its relevancy to the case at hand (the allowability of interest and attorney fees), Judge Van Oosterhout, who had joined in the majority opinion in *Robertson Lumber, supra,* described the latter case as follows:

> "* * * There we held that 42 U.S.C.A. §1594a gave the Secretary of Defense the right to prescribe the form of bond to be furnished on Capehart Projects and that when the bond prescribed and given contained more stringent provisions as to notice to be given than the

> Miller Act, the procedural provisions of the Capehart bond must be followed. We said nothing about the Miller Act decisions lacking persuasiveness in instances where the Miller Act bond and Capehart bond contained substantially similar provisions. We recognized that the Capehart bond is a bond required by federal law and stated that Congress intended that Capehart should have substantive bond protection essentially similar to that of Miller Act suppliers." *Id.* at 1011.

Judges Ridge and Mehaffy joined in the decision.

Shortly thereafter, on August 28, 1964 (rehearing denied September 22, 1964), the Eighth Circuit decided the *Allsop Lumber* case, *supra*, 336 F.2d 445, *cert. denied* 85 S. Ct. 662 (1965). In it Judge Blackmun, who had concurred in *Robertson Lumber* ("although somewhat hesitatingly," 305 F.2d at 800), was joined by Judges Matthes and Vogel in holding (1) at page 449, that the federal courts have jurisdiction over such cases under 28 U.S.C. §1352 ("any action on a bond executed under any law of the United States"), relying on and citing *Robertson Lumber, supra;* (2) that extraterritorial service of process was valid and effective, 336 F.2d at 452; (3) that the individual defendants were properly sued in their common names, *ibid.*, and (4) at pages 453-454, that the required notices were timely filed within the four month period allowed by the Missouri lien law, as provided in the bond. The remainder of the holdings are not pertinent here.

Although not clearly necessary to support its holding on the service of process issue, the court took occasion to refer to and review the decision by District Judge Oliver in *United States ex rel. Fine* v. *Travelers Indem. Co.*, 215 F. Supp. 455 (W. D. Mo. 1963). Characterizing that opinion as "thoughtful and provocative," 336 F.2d at 451, the court noted:

"* * * He there [pp. 460-465 of 215 F. Supp.] said, with appealing logic, that, had he felt the questions were open for original decision by him, he would have determined that by the original 1955 Capehart Act, Congress recognized that the Miller Act would necessarily apply to contracts for Capehart housing; that the purpose of the 1956 amendment, with its reference to bonds, was to remove any possible doubt about it; and that all substantive provisions of the Miller Act and the Capehart Act were to be read into Capehart bonds. He observed that he was controlled by this court's decision in Robertson and by its rationale. He acknowledged that Robertson in certain respects was troublesome for him, and that this was particularly so when the majority opinion concluded with the statement, p. 800 of 305 F.2d, that 'we think that the clear import of the language used was to take Capehart bonds entirely out of the Miller Act'."

After reviewing the issue and "the context" of "the majority opinion" in *Robertson Lumber* (in which he had not joined), Judge Blackmun concluded that,

"* * * We sympathetically agree in general with Judge Oliver's analysis of Robertson when he observed, pp. 461-463 of 215 F. Supp., that we 'did not hold that the Miller Act did not apply to a government military housing project contracted for under the authority of the Capehart Act'; that we reasoned that 'the Miller Act does apply, at least in some respects'; that the additional notice required by that bond 'was procedural, as distinguished from jurisdictional', and was neither unreasonable nor oppressive; that the Miller Act is generally applicable to all government contracts of this type; that under Robertson there is 'some sort of difference between the procedural requirements and the jurisdictional provisions of the Miller Act'; that, unlike [Miles Lumber v.] Harrison, the Robertson case 'can not be said to be a definite holding that the Miller Act does not in any way apply to the contracts for the construction of military housing as authorized by the

Capehart Act'; that the 'rationale of Robertson * * * requires us to hold that we are here dealing with substantive rights'; that the case intended only to pass on the dual notice question; and that this court did not intend its exclusionary language 'as a blanket command'. See, as to all this, D & L Constr. Co. v. Triangle Elec. Supply Co., supra, 332 F.2d 1009.

"We do not desire by this opinion to introduce further complications into an already too complicated area by the development of technical niceties of distinction between procedural and jurisdictional and substantive aspects. Robertson stands for what it holds, namely, that the notice provisions of a Capehart bond prevail over the less stringent notice provisions in the Miller Act. We adhere to Robertson in this respect." 336 F.2d 451-452.

Finally, at pages 452, 453 of 336 F.2d, Judge Blackmun concluded:

"If strict logic perforce demands a conclusion that this decision is but another way of saying that §270b (b) of the Miller Act has application to a Capehart bond suit, we may be understood as going that far in our present holding. This result is reached, we feel, without impinging in any way upon the authority of Robertson."

He added, in footnote 3, page 453 that, "We say this despite the implications to the contrary in [the North Dakota, New Mexico and New Jersey cases discussed above] where state court jurisdiction of Capehart bond action is upheld * * *"

Shortly thereafter on October 22, 1964, the court decided the companion cases of *Koppers Co.* v. *Continental Cas. Co.*, (8th Cir. 1964) 337 F.2d 499 and *Missouri-Illinois Tractor & Equip. Co.* v. *D & L Constr. Co. & Associates*, (8 Cir. 1964) 337 F.2d 507. Again the decisions in both

cases were written by Judge Blackmun, joined by Judge Matthes (who had also joined him in *Allsop Lumber*) and Judge Ridge (who had joined Judges Van Oosterhout and Mehaffy in the *Triangle* case, *supra*, 332 F.2d 1009). Both cases were on appeal from a subsequent opinion by Judge Oliver, *sub nom. Travis Equip. Co.* v. *D & L Constr. Co. & Associates*, 224 F. Supp. 410 (W.D. Mo. 1963), in the consolidated cases covered by his earlier opinion in the first *Fine* case, *supra*, 215 F. Supp. 455 (W.D. Mo. 1963), which had been favorably commented upon by Judge Blackmun in *Allsop Lumber, supra*.

In the *Koppers* case the court affirmed Judge Oliver's holding below that the provision in 40 U.S.C. 270b(b) of the Miller Act, vesting exclusive jurisdiction in the federal courts over cases under it, applies to deny the concurrent state court jurisdiction provided for in condition 4(c) of the Capehart Act bonds (*cf.* Ex. 2, R. 20, 23). In doing so the court remarked the direct conflict between its holding in *Allsop Lumber, supra*, and the Tenth Circuit's holding in *Miles Lumber, supra*, as to the applicability of the Miller Act, concluding:

> "We respect the opinion of the Tenth Circuit majority but, in view of the vigorous dissent there and our holding in Allsop, we must adhere to the conclusion reached in Allsop until the Supreme Court tells us we are mistaken." 337 F.2d at 503.

The opinion also noted again and discussed the conflict between its holding and those of the three state courts whose opinions it described as, "prompted and spawned either by the expression which appeared in the majority opinion in our Robertson case, p. 800 of 305 F.2d, that is, 'we think that the clear import of the language used was to take Capehart bonds entirely out of the Miller Act,' or by the nonpublic work approach of the Tenth Circuit in [*Miles Lumber* v.] Harrison."

Nonetheless, the court decided that it would adhere to its conclusion in *Allsop Lumber*, including the disagreement noted therein with the reliance on *Robertson Lumber*, which, "[W]e do not regard . . . as authority for the conclusions reached by the three state courts. . . ." 337 F.2d at 504. The opinion concluded, at page 506:

> "We therefore adhere to our holding in Allsop. That case, this one, the result we reached in Robertson, and our companion Missouri-Illinois decision, 337 F.2d 507, establish as the present law of this Circuit with respect to Capehart payment bond actions the following: The proper federal court has jurisdiction under Title 28 U.S.C. § 1352 over an action on a Capehart bond. Section 2(b) of the Miller Act, 40 U.S.C. § 270b (b), has application to a Capehart bond action and vests jurisdiction over that action exclusively in the federal court. Out-of-state service is effective. The limitation period set forth in § 2(b) of the Miller Act is applicable despite the presence of a specified longer period in the bond itself. But the dual notice requirement of a Capehart bond, being more stringent than the notice provisions of the Miller Act, is valid and effective."

(Note the omission of reference in this summary to the *Triangle* case, *supra*, 332 F.2d 1009, and the failure to include the holding in *Allsop*, *supra*, 336 F.2d 455 at pages 453-454, that the *longer* and therefore *less stringent* period allowed for serving the notices under the conditions 2 and 4a of the Capehart bond (Ex. 2, R. 20, 22) is applicable, despite the clear description of the shorter period provided by 40 U.S.C. 270b(a) as substantive and jurisdictional by this Court in *Fleisher Engineering & Constr. Co.* v. *United States ex rel. Hallenbeck*, 311 U.S. 15 (1940), at page 18.)

The narrow issue in the companion *Missouri-Illinois* case, 337 F.2d 507, was precisely the same as that in the

instant action: "Is a Capehart payment bond suit brought by a subcontractor's supplier controlled by the limitation period set forth in § 2(b) of the Miller Act, 40 U.S.C. § 270b (b) . . . or, instead, by the period the bond itself specifies * * *?" 337 F.2d at 507.

Although described as a matter of first impression at the appellate level, the court correctly noted that the instant case had then been decided by the District Court for North Dakota, "upon the authority of Judge Oliver's opinion below." *Id.* at 508.

(Factually, the cases differ in the particular that the claimant in *Missouri-Illinois* had asserted jurisdiction, among other grounds, on the very section of the Miller Act in controversy. The court noted this as having been done, "perhaps somewhat significantly." Contrast paragraph I of the First Amended Complaint in the instant case (R. 1) which, equally significantly, does *not* refer to or rely on the Miller Act for jurisdiction.)

The court referred to its prior decisions in *Robertson Lumber, Triangle, Allsop,* and *Koppers,* concluding:

> "* * * We need not repeat here what has been said in those four cases. We observe only that we have decided, expressly or by implication, *that the Miller Act does have general application to Capehart bonds* except, of course, where the two statutes are clearly different, or where the Miller Act's provisions have no sensible application to a Capehart bond, or where a procedural aspect, such as a more stringent but not unreasonable notice provision in the bond than is present in the statute, is in issue." 337 F.2d at 508. (Emphasis added.)

Against the contention of a conflict with the decision in *Robertson Lumber* and other courts relying on it, the court referred to and repeated its comments in *Allsop* and *Koppers*, "particularly our statement,

> " 'If strict logic perforce demands a conclusion that this decision is but another way of saying that § 270b (b) of the Miller Act has application to a Capehart bond suit, we may be understood as going that far in our present holding'; . . ."

337 F.2d at 508.

The next, and latest, Capehart cases to be decided by the Eighth Circuit were the instant case, decided February 1, 1965, and, perhaps ironically, one entitled *United States ex rel. Robertson Lumber Co.* v. *Continental Cas. Co.*, (8th Cir., Feb. 1, 1965) 340 F.2d 958; *rehearing denied* Feb. 26, 1965. Both cases were decided by *per curiam* opinions citing and relying on the court's opinions in the "original" (1962) *Robertson Lumber* case, *Allsop*, *Koppers* and *Missouri-Illinois*.

The continuing citations of the 1962 *Robertson Lumber* case by members of the Court of Appeals for the Eighth Circuit who did not participate in its majority opinion declaring Capehart bonds to have been taken "entirely out of the Miller Act," 305 F.2d at 800, are indeed brought to an ironic height by its citation in *Missouri-Illinois* and in the instant case to support holdings that those suits on such bonds are barred by the limitations provision in the Miller Act.

Perhaps appropriately, two literally "final footnotes" to this confusing departure from the doctrine of *stare*

decisis appear in two recent decisions by Judge Oliver in still later phases of the *Fine* and *Triangle* litigations: The first is footnote 5 at page 677 of *Fine* v. *Travelers Indem. Co.*, (W.D. Mo., Sep. 8, 1964) 233 F. Supp. 672, in which Judge Oliver quotes a part of Judge Blackmun's reference (at page 451 of *Allsop Lumber, supra,* 336 F.2d 445) to Judge Oliver's original comments in the first *Fine* case (*supra,* 215 F. Supp. 455) as to what he would have held "had he felt the question were open for original decision;" namely, "that all substantive provisions of the Miller Act and the Capehart Act were to be read into Capehart bonds." In his footnote, however, those very misgivings are now cited as having supported a *holding* in the first *Fine* case that, " 'the provisions of the Miller Act must be read into any and all payment and performance bonds' required by the federal law here involved."

This recharacterization of a once-stated misgiving about the opinion and underlying rationale which was fully explicated by the majority in the original *Robertson Lumber* case as, in fact, a "holding" is repeated in footnote 16 at page 310 of *Triangle Elec. Supply Co.* v. *Mojave Elec. Co.*, (W.D. Mo., Oct. 5, 1964) 234 F. Supp. 293.

Thus, without even the formality of having been directly overruled, has *Robertson Lumber* so often cited and relied upon by other courts as the leading decision concerning the independent status of Capehart bonds, been misinterpreted, misapplied and cast aside in the circuit of its origin, by circuit and district court judges who did not join in the perceptive and valid analysis and rationalization set forth in the majority opinion.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a write of certiorari should be granted.

HARLAN J. THOMA,
Counsel for Petitioner,
BRODY, PARKER, ROBERTS, THOMA & HARRIS,
400 Empire Building,
Des Moines, Iowa 50309.

Of Counsel:
VAL L. SCHOENTHAL,
BRODY, PARKER, ROBERTS, THOMA & HARRIS,
400 Empire Building,
Des Moines, Iowa 50309.
HERBERT L. MESCHKE,
PRINGLE, HERIGSTAD, MESCHKE, LODER,
MAHONEY & PRINGLE,
214 American State Bank Building,
Minot, North Dakota.

APPENDIX

(Opinion)

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 17,777.

Economy Forms Corporation, Appellant,
vs.
Trinity Universal Insurance Co., et al., Appellees.

Appeal from the United States District Court for the District of North Dakota.

[February 1, 1965.]

Before VOGEL, MATTHES and RIDGE, Circuit Judges.

PER CURIAM.

Summary judgment in favor of the appellees is affirmed on the basis of the District Court's opinion as published in 234 F. Supp. 930 and this court's opinions in *Continental Casualty Co.* v. *United States for the use of Robertson Lumber Co.*, 8 Cir., 1962, 305 F.2d 794, certiorari denied, 371 U.S. 922; *Continental Casualty Company* v. *Allsop Lumber Co., Inc.*, 8 Cir., 1964, 336 F.2d 445, certiorari denied January 19, 1965; *Koppers Company* v. *Continental Casualty Company*, 8 Cir., 1964, 337 F.2d 499; and *Missouri-Illinois Tractor & Equipment Co.* v. *D & L Const. Co. & Associates, et al.*, 8 Cir., 1964, 337 F.2d 507.

(Judgment)

United States Court of Appeals

FOR THE EIGHTH CIRCUIT.

No. 17,777.

SEPTEMBER TERM, 1964.

Economy Forms Corporation, Appellant,
vs.
Trinity Universal Insurance Company and Employers Reinsurance Corporation.

Appeal from the United States District Court for the District of North Dakota.

This cause came on to be heard on the record from the United States District Court for the District of North Dakota, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the summary judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

February 1, 1965.

TITLE 40

PUBLIC BUILDINGS, PROPERTY AND WORKS

Ch. 3—Buildings and Works Generally

[Miller Act]

Sec. 270a. Bonds of Contractors for Public Buildings or Works; Waiver of Bonds Covering Contract Performed in Foreign Country

(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any

person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section. [Aug. 24, 1935, P. L. 321, 49 Stat. 793.]

Sec. 270b. Rights of Persons Furnishing Labor or Material

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and ex-

ecuted and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit. [Aug. 24, 1935, P. L. 321, 49 Stat. 794; as amended Aug. 4, 1959, P. L. 86-135.]

Sec. 270c. Right of Person Furnishing Labor or Material to Copy of Bond

The Comptroller General is authorized and directed to furnish, to any person making application therefor who submits an affidavit that he has supplied labor or materials for such work and payment therefor has not been made or that he is being sued on any such bond, a certified copy of such bond and the contract for which it was given, which copy shall be prima facie evidence of the contents, execution, and delivery of the original. Applicants shall pay for such certified copies such fees as the Comptroller General fixes to cover the cost of preparation thereof. [Aug. 24, 1935, P. L. 321, 49 Stat. 794; as amended Aug. 4, 1959, P. L. 86-135.]

TITLE 42

THE PUBLIC HEALTH AND WELFARE

Ch. 9. Housing of Persons Engaged in National Defense

SUBCHAPTER XI.—HOUSING FOR MILITARY PERSONNEL

§ 1594. Contracts for construction—Contract provisions; competitive bids

(a) The Secretary of Defense or his designee is authorized to enter into contracts with any eligible bidder to provide for the construction of urgently needed housing

on lands owned or leased by the United States and situated on or near a military reservation or installation for the purpose of providing suitable living accommodations for military personnel of the armed services assigned to duty at the military installation at or in the area where the housing is situated. Any such contract shall provide that each housing unit in the project shall be placed under the control of the Secretary of Defense, or his designee, as soon as the unit is available for occupancy as determined by the Commissioner. Any such contract shall also provide that, except for stock held by the Commissioner, the capital stock of the mortgagor (where the mortgagor is a corporation) be transferred to the Secretary of Defense, or his designee, when the housing has been completed as determined by the Commissioner. Any such contract shall contain such terms and conditions as the Secretary may determine to be necessary to protect the interests of the United States. Any such contract shall provide for the furnishing by the contractor of a performance bond and a payment bond with a surety or sureties satisfactory to the Secretary of Defense, or his designee, and the furnishing of such bonds shall be deemed a sufficient compliance with the provisions of section 270a of Title 40, and no additional bonds shall be required under such section. Before the Secretary shall enter into any contract as authorized by this section for the construction of housing, he shall invite the submission of competitive bids after advertising in the manner prescribed in section 152 of Title 41.

Definition of "eligible bidder"

(b) For the purposes of this subchapter, the term "eligible bidder" means a person, partnership, firm, or corporation determined by the Secretary after consultation with the Commissioner (1) to be qualified by experience and financial responsibility to construct housing of the type

described in subsection (a) of this section, and (2) to have submitted the lowest acceptable bid.

Acquisition of capital stock of property covered by mortgage

(c) Notwithstanding any other provision of law, the Secretary of Defense or his designee is authorized to acquire the capital stock of mortgagors holding property covered by a mortgage insured under title VIII of the National Housing Act, as amended by the Housing Amendments of 1955, and to exercise the rights as holder of such capital stock during the life of such mortgage and, upon the termination of the mortgage, to dissolve the corporation; to guarantee the payment of notes or other legal instruments required by the Commissioner of such mortgagors; to make payments thereon; and to guarantee and indemnify the Armed Services Housing Mortgage Insurance Fund against loss in cases where so required. All housing facilities placed under the control of the Secretary of Defense pursuant to the provisions of this subchapter shall be deemed to be housing facilities under the jurisdiction of the military department to which they are assigned.

Opinion as to title to property; guarantee; title search and title insurance

(d) On request by the Secretary of Defense, the Attorney General shall furnish to the Secretary of Defense, or his designee, an opinion as to the sufficiency of title to any property on which it is proposed to construct housing, or on which housing has been constructed, under this section. If the opinion of the Attorney General is that the title to any such property is good and sufficient, the Secretary of Defense is authorized to guarantee, or enter into a commitment to guarantee, the mortgagee, under a mortgage on such property which is insured under sections 1748-

1748g and 1748h—1 to 1748h—3 of Title 12, against any losses that may thereafter arise from adverse claims to title. None of the proceeds of any mortgage loan hereafter insured under such sections 1748-1748g and 1748h—1 to 1748h—3 of Title 12 shall be used for title search and title insurance costs: *Provided,* That if the Secretary of Defense, or his designee, determines in the case of any housing project, that the financing of the construction of such project is impossible unless title insurance is provided, the Secretary may provide for the payment of the reasonable costs necessary for obtaining title search and title insurance. Any payments by the Secretary hereunder shall be made from the revolving fund established under section 1594a(g) of this title. Any determination by the Secretary under the foregoing proviso shall be set forth in writing, together with the reasons therefor. The Committees on Armed Services of the Senate and House of Representatives shall be promptly notified of each such determination, and of the amount of any payment made by the Secretary for title search and title insurance costs. Aug. 11, 1955, c. 783. Title IV, § 403, 69 Stat. 651; Aug. 7, 1956, c. 1029, Title V, §§ 506 (b)-(d), 507, 70 Stat. 1110; Aug. 10, 1959, Pub. L. 86-149, Title IV, § 415, 73 Stat. 323.